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IN THE

Supreme Court of the United States

October Term—1952

No. 471

GUS HALL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Opinions Below	2
Summary Statement of Matter Involved	2
Statement as to Jurisdiction	11
Statute Involved	11
Questions Presented	12
Reasons for Allowing the Writ	12
I—The scope and effect of the decision below	13
II—The inferior Federal courts do not possess the power, either inherently or under the provisions of 18 U. S. Code, §401(3), to punish a defendant who is at large on bail, for criminal contempt for the disobedience of an order which requires him to surrender for execution of the sentence imposed on him	13
The History of the Present Statute	17
III—There is no evidence in the record that petitioner had either notice or knowledge of the making of Judge Ryan's order of July 2, 1951. There was, therefore, no basis for his conviction of the disobedience of said order	34
IV—Petitioner was denied due process when the Court of Appeals sustained his conviction on the ground of his disobedience of an order of which he had not been accused, tried or convicted in the District Court, and the record conclusively shows that no such order was in fact made	37
CONCLUSION	39

Cases Cited

PAGE

Anderson v. Dunn, 6 Wheat. (U. S.) 204, 227, 231-233 ..... 16, 26

Berger v. United States, 295 U. S. 78, 82-83 39

Brewer v. Blougher (1840), 14 Pet. (U. S.) 178, 198.. 14

Continental Casualty Co. v. United States, 314 U. S. 527, 528 33

Cooke v. United States, 267 U. S. 517, 534 ..... 16, 17

De Jonge v. Oregon, 299 U. S. 353, 362 ..... 5, 37

Dennis v. United States, 341 U. S. 494 ..... 2, 3

Field v. United States, 193 F. 2d 86, 90 32

Guessefeldt v. McGrath, 342 U. S. 308, 319 14

International L. & W. Union v. Juneau Spruce Corp., 342 U. S. 237, 243 14

Jerome v. United States, 318 U. S. 101, 108, fn6 25

Johansen v. United States, 343 U. S. 427, 432 14

Marshall v. Gordon, 243 U. S. 521, 533-536 16

Matter of Michael, 326 U. S. 224, 227 17

Nye v. United States, 313 U. S. 33, 44-48 ..... 17, 27, 28

Toledo Newspaper Co. v. United States, 247 U. S. 402, 416-420 ..... 16, 17, 28

PAGE

United States v. Champlin Refining Co., 341 U. S. 290 14

United States v. Crimmins, 2 Cir., 123 F. 2d 271, 272 34

United States v. Palmer, 3 Wheat. (U. S.) 610 25

United States v. Wong Kim Ark, 169 U. S. 649, 653 .. 15

U. S. Constitution

Fifth Amendment 12

Statutes Cited

1 Stat. at L. 73, 83, chap. 20 ..... 4, 17

4 Stat. at L. 487, chap. 99 .....17, 18

18 U. S. C. Sec. 401(3) 2, 3, 11, 12, 13, 17

18 U. S. C. A. Sec. 1073 34

28 U. S. C. A. Sec. 385 17

28 U. S. C. Sec. 1254(1) 11

New York Laws of 1928, chap. 374; Penal Law, Sec. 1694-a 33

Rules Cited

Rule 42(b) 38, 39

Rule 52(d) 38

Texts Cited

Blackstone, 4 Comm. 238 *et seq.* 20, 24fn

Blackstone, 4 Comm. 318-319 21

PAGE

Frankfurter, Some Reflections on the Reading of Statutes (1947) 15, 32

Frankfurter and Landis, 37 Harv. L. Rev. 1010, 1025, fn70, 1036, fn101, 1037-1038, 1024-1038 ..... 20, 28, 29

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McKinney's Consolidated Laws of New York, Judiciary Law, Sec. 750 33

Orfield, Criminal Procedure from Arrest to Appeal (1947), 127, fn91 34

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Stansbury, Report of the Trial of James H. Peck 19, 26, 29, 30, 32

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gus Hall, respectfully prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Second Circuit (R. 257) rendered August 28, 1952, rehearing denied October 31, 1952, which affirmed a judgment of the United States District Court for the Southern District of New York convicting him of criminal contempt and sentencing him to imprisonment for a term of 3 years for the alleged disobedience of an order made by District Judge SYLVESTER J. RYAN, dated July 2, 1951 (R. 229, 230).

Opinions Below

The opinions in the Court of Appeals, which consist of the majority opinion of Judge CLARK and the dissenting opinion of Judge BIGGS, are reported at 198 F. 2d 726, 731. The opinion of the District Court is reported at 101 F. Supp. 666.

Summary Statement of Matter Involved

The petitioner was one of the defendants in *Dennis* v. *United States*, 341 U. S. 494. On June 4, 1951 this Court affirmed his conviction. On June 30, 1951, while he was still at large on the bail to which he had been admitted pending this Court's review of his conviction, he absconded (R. 247); and he was not again apprehended until October 10, 1951, when he was arrested under a bench warrant at Laredo, Texas (R. 241).

On November 1, 1951 the Government initiated this proceeding to punish petitioner for criminal contempt under the provisions of 18 U. S. Code, §401(3) [R. 1; 3-6]; the charges being that in absconding, petitioner had been guilty of "wilful and deliberate disobedience and resistance to" two orders of the District Court: one, made by Judge BONDY on November 10, 1949, which permitted petitioner to travel from the Southern District of New York to his home in the Northern District of Ohio (R. 195-197); the other, made by Judge RYAN on July 2, 1951, which directed petitioner to "personally surrender to the United States Marshal for the Southern District of New York, in Room 318, United States Court House, Foley Square, New York, N. Y., on the 2nd day of July, 1951, at 11:05 o'clock in the forenoon of that day" (R. 202-203). The District Court found petitioner guilty of both charges and sentenced him to 3 years imprisonment on each charge, the sentences to

be served concurrently and to commence on the expiration of the sentence imposed on him in *Dennis* v. *United States, supra* (R. 193).

The Court of Appeals unanimously reversed the conviction based on Judge BONDY's order; and, by a divided Court, Judge BIGGS dissenting, affirmed the conviction based on Judge RYAN's order (R. 249; 258).

In each of the Courts below, petitioner advanced the following contentions:

1. The inferior Federal courts do not have the power, either inherently or under 18 U. S. Code §401(3), to punish as a criminal contempt the disobedience, by a defendant at large on bail, of an order requiring his surrender for execution of sentence. The argument in support of this contention, which will be elaborated *infra*, was referred to as follows in the opinion of the Court of Appeals (R. 242):

> "The power of the district courts and the courts of appeals to punish for contempt is stated in 18 U. S. C. A. §401. Specifically such power may be exercised, at the court's discretion, to punish 'such contempt of its authority' as 'disobedience or resistance to its lawful writ, process, order, rule, decree, or command.' 18 U. S. C. A. §401(3). See also 18 U. S. C. A. §§402, 3691. Respondent seeks, however, by an able and industrious appeal to historical authority, to interpolate by tradition an exception for disobedience to orders to reappear for sentence directed to one convicted for a crime and enlarged on bail pending appeal."

Although the Court of Appeals said, "We may agree that the common law did not consider an absconding defendant in contempt of court" (R. 242), it nevertheless disposed of petitioner's contention in this wise (R. 243):

> "Whatever, then, may have been the common-law punishment for bail jumping, respondent here stands convicted of willful disobedience of certain specific orders made by the district court. We need not now enter into a discussion of the source of the federal contempt power; it is sufficient that the statute defines the acts toward which it may be directed. And since the offense charged falls clearly within the prescribed classes the only question that can arise is whether or not an exception is to be carved out, by an appeal to historical practices, for orders relating to personal surrender for sentence following enlargement on bail. We think not; the written provision itself contains no such exception and we know of no case qualifying its general description of offenses."*

In the argument which ensues, we shall demonstrate that the Court of Appeals fell into error in its construction of the statute; and that it did so precisely because, in contravention of long-established canons of construction, it limited its search for the intent of Congress to the literal meaning of the words of the statute, and ignored both history and law which should have persuaded it that it has never been the intention of Congress—not even when it enacted the broadly-worded provisions of Section 17 of the Act of 1789 (1 Stat. at L. 73, 83, chap. 20)—to confer on our inferior Federal courts a contempt power greater than that possessed by the courts of England under the common law.

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* Judge Biggs writes as follows in his dissenting opinion at R. 256:
"Hall's counsel contends that in the whole course of our law as well as that of England there has been no proceeding like the one at bar. The view asserted may be an exaggerated one but exhaustive independent research has disclosed no similar case. It is probably the first time that a proceeding like this has been before the courts."

2. The second contention advanced by petitioner was that, even if the contempt power does extend to the disobedience of an order such as that made by Judge RYAN on July 2, 1951, the Government did not make out a case, because it failed to prove that petitioner had either knowledge or actual notice of the existence of said order at any time prior to his arrest on October 10, 1951. The Court of Appeals acknowledged that such notice or knowledge is a prerequisite to a conviction for criminal contempt. For it wrote as follows (R. 246):

> "Under 18 U. S. C. A. §401(3), there must be proof of the contemnor's knowledge of the order, *Kelton* v. *United States*, 3 Cir., 294 F. 491, certiorari denied 264 U. S. 590; and the burden on the Government is a high one. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444; *United States* v. *Dachis*, D. C. S. D. N. Y., 36 F. 2d 601; *United States* v. *Univis Lens Co.*, D. C. S. D. N. Y., 88 F. Supp. 809."

But there was no evidence to support a finding of such knowledge on petitioner's part. Indeed, his absconding on June 30th, two days before Judge Ryan made his order of July 2nd, would seem to have precluded even the possibility of adducing such evidence, unless it were to take the form of an admission or confession of knowledge by petitioner. And there was no such admission or confession. How, then, did the Court of Appeals arrive at its affirmance of his conviction? Incredible as it may seem, the answer is this: The Court of Appeals thought, erroneously, as we shall show, that an oral order for petitioner's appearance in court on July 2, 1951 had been made by Judge RYAN on June 29, 1951, and that this had been communicated to him the same day by Mr. Sacher (R. 246-248); and on the strength of this erroneous assumption of an order made and communicated on June 29, 1951, it has affirmed a conviction based on a charge of disobedi-

ence of an order made on July 2, 1951. Thus, petitioner has been denied due process not only because he stands convicted upon a charge neither made nor tried in the District Court (*De Jonge* v. *Oregon,* 299 U. S. 353, 362), but because the order on the basis of which he *now* stands convicted was, as we shall show, never made.

That the ground of decision was precisely that which we have stated it to be, is clear on the face of the majority's opinion, which so far as pertinent reads as follows (R. 246-248):

> "The evidence adduced showed the following: Upon the Supreme Court's affirmance of the conviction, a proposed order on mandate requiring surrender on July 2, 1951, at a specific time was served on Mr. Sacher, an attorney in the case, on June 28, 1951.* The next day Mr. Sacher appeared before Judge Ryan in support of applications for orders to show cause why the sentences should not be reduced or, as to one of the defendants, suspended because of illness. Judge Ryan agreed to hear the applications on July 2, and Mr. Sacher stated: 'You have my word that all of these defendants will be here at that time.' *By July 3, however, four had failed to appear and, upon Judge Ryan's inquiry as to where he last saw these four, Mr. Sacher stated that he had seen them on Friday (June 29) at 35 East 12th Street. The court inquired: 'Did you tell them at that time that their presence was required in court yesterday morning?' Mr. Sacher replied: 'Definitely. As a matter of fact I advised that because I think I saw them among other defendants after I had been here on Friday, your Honor, and had made these motions, and there-*

* The proposed order did not contain provision for surrender on July 2, 1951. It provided for surrender "on the day of July, 1951" (R. 250).

fore advised that they all should be present, and I was assured that they would be.'

"There was further evidence, given by a person present, of a banquet in respondent's honor at Cleveland on June 24, 1951, where the remarks of respondent, as well as other speakers, showed full awareness that he was about to be imprisoned to serve his federal sentence. So early in the morning of June 30 he was observed to leave his New York apartment, carrying two suit cases and some suits on a hanger to an automobile, and to drive away. He then had light hair and a mustache, and was heavier in weight than at his trial. When he was apprehended three months later on the Mexican border his hair was dyed dark brown, his mustache had been removed, and he weighed twenty pounds less. He did not take the stand.

"*Hence from the uncontroverted evidence it appeared that there was a specific order for his appearance, that this was directly communicated to him, and that he willfully and intentionally absconded two days before his ordered appearance.* The only possible gap in the proof is the lack of complete and direct showing of his awareness of the purpose for which his court attendance was required. In vigorous and able argument, his counsel makes much of this and suggests in fact that counsel's own explanation to the court indicates that he was told to be present to hear the arguments on the motions. The statement quoted above—'and therefore advised that they all should be present'—is at best equivocal, but we need not look to this alone. Respondent, with a considerable legal sophistication born of long involvement, could hardly have arrived at the bizarre conclusion (under the circum-

stances) that he was wanted then only to hear lawyers' talk; and his actions in furtively absconding show rather decisively that he was under no illusions as to his situation.

"On this record, therefore, we think the court was eminently justified in finding as a fact that respondent had complete notice of the order and willfully disobeyed it. * * *" (Italics supplied.)

Now, what "specific order for (petitioner's) appearance" was there "which was directly communicated to him" prior to his absconding, as the Court of Appeals asserts in the above-italicized portion of its opinion? Although the Court says "there was a specific order for his appearance", it does not tell us when, where, by whom, or in what form and in what words the order was made. The only clue to what it had in mind is to be found in its assertion that the order was one "which was directly communicated to (petitioner)." Now, the record contains evidence of only *one* communication made to the petitioner, namely, that which Mr. Sacher made to him on Friday, June 29, 1951, after Mr. Sacher's appearance before Judge RYAN the same day, and which is referred to in the Court's opinion in the first paragraph quoted above. And it also contains evidence of only *one* appearance by Mr. Sacher before Judge RYAN prior to petitioner's absconding, namely, his appearance on Friday, June 29, 1951. Hence, if any order for petitioner's appearance had been made prior to his absconding, it would have to have been an oral order, since no written one is pointed to, made by Judge RYAN on Friday, June 29, 1951 during Mr. Sacher's appearance before him on that day. *But Judge Ryan himself denies that he made any such order.* Let the record speak! The following appears at pages 27-28 of the Transcript of Record herein:

"Mr. Sacher: Now, the point I am about to make is the following, and perhaps it will become apparent to your Honor why I thought it necessary that there should be some considerable period of time to prepare a brief so as to be of assistance to the court.

"Basically the position we take in regard to your Honor's order of July 2nd is that it was not an order made with the intention that it should constitute a command for the violation of which contempt should be the consequence.

"The Court: That does not accord with my recollection of the facts. *My recollection of the facts was that I think on the Friday (June 29) preceding this Monday (July 2) I had appeared in court; there were stenographic minutes taken at the time, and I think you were in court on that Friday afternoon (June 29).*

"Mr. Sacher: I was, your Honor.

"The Court: *And I then (June 29) was asked by the United States attorney to make a direction that the defendants appear at a certain time on Monday (July 2). The mandate had not as yet been received and my recollection is—the minutes will show whether I am correct or not—that I said that since the mandate had not been received and filed in this court, that I felt I was without jurisdiction to make such an order. However, I think I received some assurance from counsel that the defendants would be present in court Monday (July 2), and at that time I would hear arguments on motions which had been made with reference to the sentence imposed on one or two of these defendants.* * * *" (Italics supplied.)

We think that what originally misled the Court of Appeals into the belief that an order for petitioner's appearance had been made by Judge RYAN on June 29, 1951, was the colloquy between the Judge and Mr. Sacher on July 3rd, concerning which the Court wrote as follows (R. 247):

> "By July 3, however, four had failed to appear and, upon Judge Ryan's inquiry as to where he last saw these four, Mr. Sacher stated that he had seen them on Friday (June 29) at 35 East 12th Street. *The court inquired: 'Did you tell them at that time that their presence was required in court yesterday morning?' Mr. Sacher replied: 'Definitely. As a matter of fact I advised that because I think I saw them among other defendants after I had been here on Friday, your Honor, and had made these motions, and therefore advised that they all should be present, and I was assured that they would be.'* " (Italics supplied.)

Apparently the Court of Appeals majority thought that when Mr. Sacher replied in the affirmative to the Court's question, "Did you tell them at that time that their presence was *required* in court yesterday morning?", the basis had been laid for an inference that an *order* requiring defendant's presence had been made. Whether such an inference would be permissible, even in the absence of evidence to the contrary, we need not say. For where, as here, the record conclusively establishes that *no* such order was in fact made, it is, we submit, nothing short of denial of due process to proceed on a contrary hypothesis. Assuming that counsel told petitioner in so many words, "You are required to be in court on Monday, July 2, to surrender yourself for execution of the sentence imposed on you," there would still be no basis whatever to punish petitioner for criminal contempt, because there was *in fact*

no order of any kind which required him to be in court at that time. Counsel, it is true, gave Judge RYAN his "assurance" on Friday, June 29th, that "the defendants would be present in court Monday" (July 2nd). We know, however, of no alchemy by which an assurance of counsel can be transformed into a "specific order" of the Court and be made the basis of a conviction for contempt. For this would be a punishing of *constructive* contempts with a vengeance.

Statement as to Jurisdiction

The judgment of the Court of Appeals was rendered on August 28, 1952 (R. 257). A petition for rehearing before that Court was denied on October 31, 1952 (R. 283). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

Statute Involved

18 U. S. Code, Section 401; June 25, 1948, c. 645, 62 Stat. 701:

> Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Questions Presented

1. Did the Courts below have the power, either inherently or under the provisions of 18 U. S. Code, §401(3), to punish petitioner, who was at large on bail, for criminal contempt for his alleged disobedience of an order requiring him to surrender for execution of the sentence theretofore imposed on him?

2. Was petitioner liable to punishment for criminal contempt for his alleged disobedience of the order made by Judge RYAN on July 2, 1951, in the absence of proof that he had either knowledge or actual notice of the existence of said order prior to his arrest on a bench warrant?

3. Was it consistent with the due process requirements of the Fifth Amendment to the Constitution for the Court of Appeals to affirm petitioner's conviction of disobedience of Judge RYAN's order of July 2, 1951, on the ground of his disobedience of another order of which he had not previously been accused, tried or convicted in the District Court?

4. Was there evidence sufficient to support the finding of the Court of Appeals that an order for petitioner's appearance in the District Court had been made and communicated to him prior to his absconding on June 30, 1951?

Reasons for Allowing the Writ

The writ should be granted because the Court of Appeals has (1) decided an important question of federal law which has not been, but should be, settled by this Court;

(2) decided a federal question in a way which is in conflict with applicable decisions of this Court; (3) so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

I

The scope and effect of the decision below.

The decision of the Court of Appeals gives a scope to the contempt power which courts did not possess even during the darkest days of England's judicial history. The decision says, in effect, that the American of to-day has, in this respect, a lesser freedom as a citizen of the United States than did his forbears as subjects of George III. The Court of Appeals has, for the first time in the history of Anglo-American law, sanctioned punishment of conduct in contempt proceedings which has never been so punished. And it has accomplished this by what we are constrained to call an act of judicial legislation.

II

The inferior Federal courts do not possess the power, either inherently or under the provisions of 18 U. S. Code, §401(3), to punish a defendant who is at large on bail, for criminal contempt for the disobedience of an order which requires him to surrender for execution of the sentence imposed on him.

There can, of course, be no doubt that if regard is had only for the current literal meaning of the words used in 18 U. S. Code, §401(3), the statute must be construed to confer on the inferior Federal courts the power to punish the disobedience of *every* lawful order they make. "But literal-

ness is no sure touchstone of legislative purpose." (*International L. & W. Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243). More than a hundred years ago, Chief Justice TANEY, writing on behalf of a unanimous Court, said in *Brewer* v. *Blougher* (1840), 14 Pet. (U. S.) 178, 198:

> "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature, from the words used in the statute, *and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it.*" (Italics supplied.)

Indeed, as recently as the 1951 Term there were at least three cases in which this Court *expressly* denied effect to the literal meaning of statutory words and arrived at a Congressional intent contrary to that conveyed by the naked words on the basis of such considerations as: "the context of this legislation" (*International L. & W. Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243);* the symmetry of the "entire statutory system of remedies against the Government" (*Johansen* v. *United States*, 343 U. S. 427, 432); the "makeshift patchwork" nature of the statute and the likelihood that a decision in accordance with its literal meaning would require the Court to decide debatable constitutional questions (*Guessefeldt* v. *McGrath*, 342 U. S. 308, 319).

And in the 1950 Term, this Court, in *United States* v. *Champlin Refining Co.*, 341 U. S. 290, construed a statute not to include the appellee, "despite the generality of the

* In the *International L. & W. Union* case, *supra*, the Court went so far as to say that in its reading of the statute there under consideration, it did not "take the words 'district court of the United States' in their historic, technical sense" (—— U. S. at page ——).

statutory terms used", which, if literally interpreted, would have embraced it; the Court saying at page 297: "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent."

If anything can be said to be firmly established in regard to the construction of constitutional and statutory provisions it is that:

> "In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; *but also to the condition, and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.*" (Italics supplied.)
>
> *United States* v. *Wong Kim Ark,* 169 U. S. 649, 653.

The rationale that underlies this approach to statutory construction was stated by Mr. Justice FRANKFURTER in "Some Reflections on the Reading of Statutes" (1947) as follows (p. 23):

> "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. *The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment.*" (Italics supplied.)

The Court of Appeals chose, however, to *ignore* the history of the contempt statute, which petitioner laid before

it in the belief that it would demonstrate that Congress never intended that the disobedience of an order requiring a defendant on bail to surrender for execution of sentence, should be punishable in contempt proceedings. The Court of Appeals did not reject petitioner's appeal to history on the ground that it did not support his thesis. It just *ignored* it, apparently thinking that the literal meaning of the statutory words was all that mattered. For it said (R. 243-244):

> "Whatever, then, may have been the common-law punishment for bail jumping, respondent here stands convicted of willful disobedience of certain specific orders made by the district court. We need not now enter into a discussion of the source of the federal contempt power; it is sufficient that the statute defines the acts toward which it may be directed. And since the offense charged falls clearly within the prescribed classes the only question that can arise is whether or not an exception is to be carved out, by an appeal to historical practices, for orders relating to personal surrender for sentence following enlargement on bail. We think not; the written provision itself contains no such exception and we know of no case qualifying its general description of offenses."

The approach of the Court of Appeals is all the less comprehensible, in view of the fact that this Court, whenever called upon to determine the scope of the contempt power, whether of Congress or of the courts, under Constitution or statute, has uniformly consulted the history of the power, either English or American, and most times both (*Anderson* v. *Dunn*, 6 Wheat. (U. S.) 204, 231-233; *Marshall* v. *Gordon*, 243 U. S. 521, 533-536; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 416-420; *Cooke*

v. *United States,* 267 U. S. 517, 534; *Nye* v. *United States,* 313 U. S. 33, 44-48; *Matter of Michael,* 326 U. S. 224, 227). Indeed, such is the weight which this Court attaches to history in this area, that on one occasion, namely, in *Nye* v. *United States, supra,* it overruled its earlier decision in *Toledo Newspaper Co.* v. *United States, supra,* and rejected a construction of the contempt statute (which Chief Justice STONE referred to at p. 56 of his dissenting opinion as one that had been "so long applied and not hitherto doubted in this Court"), because later research had demonstrated "the inaccuracy of (the) historic observation" on which the earlier construction had been based (*Nye* v. *United States, supra,* 47).

The History of the Present Statute

The present contempt statute, 18 U. S. C. A., §401(3), derives from former §268 of the Judicial Code, 28 U. S. C. A., §385, which, in turn was derived from the Act of March 2, 1831, 4 Stat. at L. 487, chap. 99 (*Nye* v. *United States, supra,* 44-45). The Act of 1831 was enacted by Congress to effectuate "a drastic delimitation * * * of the broad undefined (contempt) power of the inferior federal courts under the Act of (September 24) 1789", 1 Stat. at L. 73, 83, chap. 20 (*Nye* v. *United States, supra,* 45). From which it follows that if these Courts had no power under either the Act of 1789 or that of March 2, 1831, to punish a defendant in contempt proceedings for disobedience of an order requiring him to surrender for sentence, they have no such power under the present statute.

The Act of 1789 provided (1 Stat. at L. 73, 83, chap. 20):

> "Sec. 17. *And be it further enacted,* That all the said courts of the United States shall have power * * * to punish by fine or imprisonment, at the dis-

cretion of said courts, all contempts of authority in any cause or hearing before the same. * * *"

The Act of March 2, 1831, so far as pertinent, provided (4 Stat. at L. 487, chap. 99):

> "CHAP. XCIX.—*An Act declaratory of the law concerning contempts of court.*
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Now, what conduct did Congress intend to reach when, by the Act of 1789, it authorized the inferior Federal courts to punish "all contempts of authority in any cause or hearing before the same"? And what conduct did it intend to reach when it declared in the Act of March 2, 1831 that "*the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court,* shall not be construed to extend to any cases except * * * the disobedience or resistance by any * * * party * * * to any lawful writ, process, order, rule, decree, or command of the said courts"? We think, on the basis of the historical facts below set forth and the

rules of statutory construction applied by this Court from its earliest beginnings, that the answers are these: By its enactment of section 17 of the Act of 1789, Congress intended, *at most*, to declare or grant to the inferior Federal courts the power to punish in contempt proceedings conduct which the courts had so punished under the common law.* And by its enactment of the Act of March 2, 1831, it intended to effectuate the following limitations: (a) In respect to misbehavior other than that committed by officers of the court in their official transactions, it intended to reach only such conduct as occurred in the presence of the court or so near thereto geographically as to obstruct the administration of justice. (b) In respect to the disobedience of orders, etc., of the courts, it intended to reach only such conduct as constituted contempt at common law, i.e., conduct in respect to which the courts at common law had the power "to issue attachments and inflict summary punishments for contempts of court". Since, as we shall show below, the disobedience of an order requiring a defendant to surrender for sentence was *not* regarded as a contempt at common law for which the courts had the power "to issue attachments and inflict summary punishments", it follows that the inferior Federal courts do not have the power to punish the disobedience of such an order as a contempt.

In Stansbury, *Report of the Trial of James H. Peck*, Mr. Henry R. Storrs, one of the Managers on the part of

* The great William Wirt maintained, in the impeachment proceedings of Judge JAMES H. PECK, that section 17 of the Act of 1789 gave recognition to a *lesser* contempt power than the courts possessed at common law, for he argued as follows: "Let us return, for another moment, to the 17th section. I wish merely to add that it has received a construction by the Supreme Court of the United States in the case of *Anderson and Dunn* (6 Wheat. 204), which has been already cited. For that court has held, as the honorable managers themselves have admitted, that the (contempt) power would have existed without the section, *and that the power extends to cases not enumerated by this section.*" Stansbury, Report of the Trial of James H. Peck, 502.

the House of Representatives, who has been called "the learned Storrs",* said at page 403:

> "*Contempt* was a *crime* at common law, and the mode of punishing it chiefly distinguished it from others—it being the only public offence punishable summarily by attachment, fine and imprisonment, except when summary convictions had been ordered by Statute. It was classed among crimes by all writers. Hawkins and Blackstone both assign it to that place."

Blackstone, whose Commentaries appeared shortly before the American Revolution, writing of contempts in Chapter XX of his work, which is entitled "*Of Summary Convictions*", says (4 Comm. 283 *et seq.*):

> "To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon.
>
> "The contempts that are thus punished are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority. The principal instances of either sort, that have been usually punishable by attachment are chiefly of the following kinds: * * * 6. Those committed by parties to any suit or proceeding before the court; as by disobedience to any rule or order, made in the progress of a cause; * * *."

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* FRANKFURTER and LANDIS, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1025, footnote 70.

Although the generality of the language of the last clause in the foregoing quotation would lead one to believe that disobedience of an order requiring a defendant in a criminal case to appear or surrender for sentence would fall within its terms, Blackstone himself, as well as Hale and Pollock and Maitland, makes it clear beyond doubt that a defendant who absconded, whether in disobedience of an order or not, was not, at common law subject to attachment and summary trial in contempt proceedings. Indeed, a contumacious absconder could not be punished at all until his appearance or surrender had been demanded and required in five successive county courts; and it was not in contempt proceedings, but by the process of outlawry that he was then dealt with. Blackstone treats of the subject of absconding defendants in criminal cases in Chapter XXIV, which is entitled "*Of Process Upon Indictment*", where he says (4 Comm. 318-319):

> "The proper process on an indictment for any petit misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken on the first capias, a second and a third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process; and, for treason or homicide, only one shall be allowed to issue, or two in the case of other fel-

onies, by statute 25 Edw. III, c. 14, though the usage is to issue only one in any felony, the provisions of this statute being in most cases found impracticable. And so, in the case of misdemeanors, it is not the usual practice for any judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry, that is, he shall be exacted, proclaimed or required to surrender at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law, so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

"The punishment for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions (of which, and the previous process by writs of *capias, exigi facias*, and *proclamation*, we spoke in the preceding book) viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offense charged in the indictment, as much as if the offender had been found guilty by his country."

That outlawry was the *only* process employed at common law to deal with a contumacious absconder is made clear in 2 Pollock and Maitland, *The History of English*

Law, 447 (1895), where it is said that in the 13th century "outlawry had lost its exterminating character and had become an engine for compelling the contumacious to abide the judgment of the courts." While the process of outlawry had potentialities that were far more cruel than those that inhere in contempt proceedings, it had, at least, this more lenient aspect, that its penalties were not visited on an absconder, no matter how wilful or grave his contumacy, unless he was *quinto exactus.* For, as is said in 1 Pollock and Maitland, *The History of English Law,* 539 (1898):

> "According to the law of the thirteenth century no man could be outlawed until he was *quinto exactus,* that is until his appearance had been demanded in five successive county courts. If we suppose that the court sat but once in six months, then the process of outlawry, which we may well suppose to be very ancient, could not be accomplished in less than two years and a half."

Conversely, Hale's *Pleas of the Crown* makes it clear that if an absconder was apprehended *before* he was *quinto exactus* he received no punishment at all. Thus it is said in 2 Hale's *Pleas of the Crown,* 201, 224:

> "If the defendant renders himself to the sheriff before the *quinto exactus,* and appears in court at the return of the *exigent* and pleads, and is bailed to attend the trial, and then makes default, the inquest shall not be taken by default in any case of felony, either upon an indictment or an appeal, though it may in other cases, but a new *capias,* and after *that* an exigent shall issue, and a *capias* against the bail."

* * *

> "If a *capias* be awarded aganist a felon, and he renders himself, and pleads not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* shall issue; and if brought in, he shall be tried upon his plea, but it is said by *Scot,* that if he had rendered himself upon the *exigent* and pleaded not guilty, and been let to bail till the trial, and then made default, whereupon an exigent is awarded, and the felon is brought in upon the *exigent,* he shall plead *de novo,* and consequently be arraigned *de novo,* for by the *exigent* awarded, the first issue is discontinued."

The Court of Appeals seems to have been persuaded that the disobedience of an order requiring the appearance or surrender of a defendant in a criminal case, did not constitute contempt at common law. For it said in its opinion (R. 242):

> "We may agree that the common law did not consider an absconding defendant in contempt of court. It appears that such penalty as was imposed stemmed from the doctrine of outlawry which, on defendant's failure to appear at the fifth proclamation—*quinto exactus*—in successive county courts, 4 Bl. Comm. 283,* effected a forfeiture of all goods and chattels."

But having gone this far, the Court stopped. It did not consider the bearing of these crucial historical-legal facts on the construction to be placed on the Acts of 1789 and 1831, and, hence, on the present statute, whose provisions descend directly from those contained in the first section of the Act of March 2, 1831, which is quoted *supra.* Our contention, in a nutshell, is: That when Congress enacted

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* The Court's citation of 4 Bl. Comm. 283 deals, not with outlawry, but with contempt. The citation for outlawry is 4 Bl. Comm. 318-319.

the Act of 1789, which "was fabricated by a knot of lawyers" (1 Warren, *The Supreme Court in United States History*, 9; 1922 ed.), and declared in section 17 thereof that the Federal courts "shall have power * * * to punish * * * all contempts of authority in any cause or hearing before the same", it used the term "contempts" in the sense in which it was recognized and defined at common law; and since, as the Court of Appeals grants, "the common law did not consider an absconding defendant in contempt of court", the term "contempts," as used in the Act of 1789, was not intended to embrace conduct which was not "contempt" at common law. "Contempt", as Mr. Storrs said, *supra*, "was a crime at common law, and the mode of punishing it chiefly distinguished it from others—it being the only public offence punishable summarily by attachment, fine and imprisonment, except when summary convictions had been ordered by Statute." Our construction of the term in the light of its common law meaning is sustained by the highest authority. As long ago as *United States* v. *Palmer*, 3 Wheat. (U. S.) 610, Chief Justice MARSHALL in construing the meaning of the term "robbery" as used in a statute enacted by Congress, said at page 630:

> "Of the meaning of the term 'robbery' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

And in *Jerome* v. *United States*, 318 U. S. 101, 108, footnote 6, it is said:

> "It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning. United States v. Palmer, 3 Wheat. (U. S.) 610, 630; United States v. Smith, 5

Wheat. (U. S.) 153, 160; Harrison v. United States, 163 U. S. 140, 142."

To the extent that this Court construed section 17 of the Act of 1789 in *Anderson* v. *Dunn*, 6 Wheat. (U. S.) 204, which is the only case we know of in which any construction of that section has been made, its construction sustains our thesis. For the Court there said the following at page 227:

> "It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, *it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.*" (Italics supplied.)

No one, however, has ever thought that the contempt power of our inferior Federal courts, whether inherent or statutory, extends to conduct to which the power was not applied at common law. Not even in the celebrated case of Judge PECK was such a claim made, although his defense demanded establishment of the widest possible scope for the contempt power. For his counsel, William Wirt, argued as follows (Stansbury, *op. cit.*, 503):

> "For whence, let me ask, has the honorable manager derived the knowledge of this necessary and in-

herent power (to punish contempts)? Certainly not from abstract speculation, *a priori,* in his closet. No, sir; he will not affirm this. He has drawn it from the English and American books, and has felt its truth confirmed by his own experience and observation. *And such being the fact, when a question arises as to the extent of the power, and the cases to which it is applicable, to what sources of information can we more properly and wisely look, than to those from which we derive the knowledge of the existence and necessity of the power itself. The same judicial history which gives us the origin and cause of the power, gives us, also, the cases in which it has been found necessary to apply it. These examples show the principle of the power, its aim and object, and its extent.* It is the principle explained and illustrated by its practical application: and its existence and mode of operation are imparted to us by the same authorities. We cannot gain knowledge of its existence, without learning its extent on the same page." (Italics supplied.)

If there still remains a lingering doubt as to whether the contempt power of our inferior Federal courts, either inherent or statutory, extends to conduct which was not a "contempt" at common law, we think it should be dispelled by the Act of March 2, 1831. That Act represented "a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789." (*Nye* v. *United States, supra,* 45.) To suggest that the contempt power under the present statute, which is a direct derivative of the Act of 1831, extends to the disobedience of orders requiring the appearance or surrender of a defendant in a criminal case, is, however, to deny the Act of 1831 its character of being a "drastic delimitation"

of the power. Indeed, to adopt that suggestion is to convert the Act into an engine for the expansion of the power. For, as we have shown, the power did not previously extend to disobediences of the kind here under consideration. An absconding defendant was not, prior to the enactment of the Act of 1831, subject to attachment and summary punishment in contempt proceedings. That Congress did not intend to *expand* the power in any respect is clear from the face of the Act. For the Act itself states that it is "*declaratory* of the law concerning contempts of court." Of this Frankfurter and Landis say in *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1036, fn. 101:

> "Of course the Act of 1831 was put in declaratory terms because to Buchanan and the proponents of the measure that Act was merely an affirmation of existing law."

Indeed, it is not too much to say that if the decision of the Court of Appeals is allowed to stand, it will represent as much of a defeat of the purpose which Congress sought to serve by the enactment of the Act of 1831, as did the decision in *Toledo Newspaper Co.* v. *United States, supra* (Frankfurter and Landis, *op. cit.*, 1037-1038; *Nye* v. *United States, supra*, 44-49). For the history of the Act shows that the specific evil which Congress intended to combat was the application of the contempt power to conduct to which the power had not been applied by the common-law courts.

"[T]he significant details of 'the situation' out of which the Act of 1831 arose and which alone give it meaning", are now too well known to require repetition here (Frankfurter and Landis, *op. cit.*, 1024-1038). Suffice it to say that

the immediate occasion for the enactment is to be found in an exercise of the contempt power by Judge Peck, for which the House of Representatives impeached him and 21 out of 43 senators voted to convict him (Frankfurter and Landis, *op. cit.*, 1025), on the ground, as stated by Mr. McDuffie, one of the House managers of the impeachment before the Senate, that he had been "guilty of a dangerous usurpation of power, in proceeding by the summary process of attachment, as for a contempt, to pronounce sentence and inflict punishment" on one Lawless (Stansbury, *op. cit.*, 85). The "learned" Storrs added that "the question on which the impeachment rested, was whether the Courts of the United States possessed the power of punishing the offence of a general libel on the court, not relating to any cause or matter pending or in a course of judicature before them, by the process of attachment and summary conviction." (Stansbury, *op. cit.*, 372). In support of his thesis that the said courts did not possess the power and that Judge PECK had, therefore, usurped the power he exercised, Mr. Storrs said (Stansbury, *op. cit.*, 372):

> "That before the statutes of Scandalum Magnatum, this was at common law the crime of libel, of the nature of Contempt against the King's Government and Authority:
>
> "That the Year Books and judicial records contained no case in which the courts had taken cognizance of it summarily, as for a contempt; to the time of Geo. III no judicial proceedings could be found, except in the Star Chamber, which countenanced the inference that the courts possessed such a jurisdiction."

(We think it not inapropos to observe, at this point, that not even in the Star Chamber can one find a case in

which it was held that the disobedience of an order requiring a defendant to appear or surrender was punishable as a contempt.)

Mr. Buchanan, who made the closing argument on behalf of the House managers, said at one point (Stansbury, *op. cit.*, 429-430):

> "I have now arrived at the great points of the cause. And I shall in the first place proceed to show, that the conduct of Judge Peck was in express violation of the constitution and laws of the country. * * *
>
> "In discussing the first proposition, it is not my intention to occupy any of the ground so ably gone over by my colleague (Mr. Storrs). I shall neither mar the beauty nor the force of his argument by any observations of my own. He has conclusively established, that the power to punish the offence of scandalizing a court was a Star Chamber power; and although it was there exercised in a summary manner by attachment, fine and imprisonment,—yet that after it came into the court of King's Bench, upon the dissolution of that odious tribunal, this offence has always been tried, like other criminal charges, by a jury of the country."

At another point in his closing argument, Mr. Buchanan said (Stansbury, *op. cit.*, 434):

> "In the progress of this trial we have made a long excursion to England. We have had the principles of the English government extensively discussed, and the court has been entertained with a minute account of the judicial history of that country. And what does it all prove towards the elucidation of this cause? I should not have cared if the

> gentlemen (Judge Peck's attorneys) had succeeded in establishing, that the offence of scandalizing a court, whether a cause was pending or not, is punishable in a summary manner in England. If it were so, what then? Are we to look to the laws of England, or to the constitution and laws of the United States, for the powers of our judges? At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy."

In the light of all the foregoing, there can be no doubt, we submit, that when Congress declared in the Act of 1831 "that the power of the several courts of the United States to issue attachments, and inflict summary punishments for contempts of court, shall not be construed to extend to any cases, except * * * the disobedience or resistance by any * * * party * * * to any lawful writ, process, order, rule, decree, or command of the said courts", it intended to confine the power to punish disobedience of orders in contempt proceedings to those for which the common-law courts issued attachments and inflicted summary punishment in contempt proceedings.

Even if we were to limit ourselves to the judicial history of our own country, and ignore almost a millenium of English history in the course of which the power here asserted for the first time was never claimed or exercised, we should have to conclude that Congress never intended to confer upon the inferior Federal courts the power as applied to this petitioner. Never before, during the 162 years that elapsed between the enactment of the Act of 1789 and the commencement of this proceeding, has a single one of the many thousands of fugitives from justice been prosecuted in any state or federal court for contempt.*

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* Vide: Judge Biggs' opinion, R. 256.

The significance of this fact for the proper disposition of this case is clearly indicated in Mr. Justice FRANKFURTER's *Some Reflections on the Reading of Statutes,* when he says at page 26:

> "While assertion of authority does not demonstrate its existence, long continued, uncontested assertion is at least evidence that the legislature conveyed the authority. *Similarly, while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given.*" (Italics supplied.)

Moreover, the contempt power has its origin in necessity. Mr. Storrs said at one point in his argument in the *Peck* case (Stansbury, *op. cit.,* 404):

> "The necessity of the case doubtless led to the summary punishment by attachment; (for) contempts of court consisted of interference in their proceedings and obstructions of their authority which no other mode of proceeding could adequately redress, and this was doubtless the reason why the process by summary proceeding was originally adapted to the case."

But the necessity which gives rise to the contempt power in other cases does not exist in the case of the disobedience of an order which requires the appearance or surrender of a defendant. In those other cases, as Mr. Storrs correctly observes, the courts have no other process available to coerce compliance with their orders. For the disobedience of an order requiring a defendant's appearance or surrender, however, the courts have always had at hand another avenue of redress, namely, the bench warrant, concerning which Mr. Justice REED, as Acting Circuit Justice for the Second Circuit, said in *Field* v. *United States,* 193 F. 2d 86, 90:

> "Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, *and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed.*" (Italics supplied.)

Orders and commands for the appearance or surrender of defendants in criminal cases are a daily commonplace in our courts. (See, for example, *Continental Casualty Co.* v. *United States*, 314 U. S. 527, where it appears at page 528 that the defendant in a criminal case was convicted on June 20, 1940, "and was on that day directed to appear in the court on July 19, 1940 for sentence"; he failed to appear on the latter date, and all that followed was a forfeiture of his bail and the issuance of a bench warrant, under which he was apprehended, and thereafter sentenced only on his conviction of the offense for which he had originally been tried. See also the undenied statement of petitioner's counsel concerning the practice in the Criminal Part of the United States District Court for the Southern District of New York, at R. 131-132). Yet never before has the violation of such an order or command resulted in the prosecution, let alone the conviction, of a single absconder for contempt. That the total absence of such prosecutions in both England and our own country attests to the absence of the power, is further confirmed by the measures that have been employed to punish absconders when punishment has been thought necessary or desirable. When the State of New York, for example, decided to punish absconders, it resorted not to contempt proceedings, although its criminal contempt statute (McKinney's Consolidated Laws of New York, *Judiciary Law*, §750) authorizes its courts of record to punish "wilful disobedience to (their) lawful mandate", but to the enactment by the legislature of a statute which made bail-jumping a felony (Laws of 1928, chap. 374; Penal Law, §1694-a). That the matter of punishing absconders is not regarded as one of any great urgency seems to be

indicated by the fact that Congress has never enacted a statute to punish fugitives from Federal justice (although it has enacted a statute for the punishment of fugitives from State justice who move or travel in interstate or foreign commerce, namely, 18 U. S. C. A. §1073); and, with the exception of New York, none of the States, at least as of 1947, has enacted any legislation for the punishment of their fugitives from justice (Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 127, fn. 91).

It is respectfully submitted that the Courts below were without power to punish petitioner for contempt for his alleged disobedience of an order requiring him to surrender for sentence.

III

There is no evidence in the record that petitioner had either notice or knowledge of the making of Judge Ryan's order of July 2, 1951. There was, therefore, no basis for his conviction of the disobedience of said order.

As we have already pointed out, the Court of Appeals recognized that proof of a contemnor's knowledge of an order is a prerequisite to conviction for disobedience thereof. For it said that "under 18 U. S. C. A. 401(3), there must be proof of the contemnor's knowledge of the order, *Kelton* v. *United States*, 3 Cir., 294 F. 491, certiorari denied 264 U. S. 590" (R. 246). This is no more than the specific application to contempts of a principle that generally pervades our criminal law, namely, that which Chief Judge Learned Hand stated as follows in *United States* v. *Crimmins*, 2 Cir., 123 F. 2d 271, 272:

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal."

An argument such as that which we make under this heading would ordinarily require an analysis of the record with a view to demonstrating the absence of evidence of petitioner's knowledge of Judge RYAN's order of July 2, 1951. That course is made unnecessary here because the Court of Appeals has itself recognized that there was a total absence of such evidence. For it did not predicate its affirmance of petitioner's conviction on a finding that he had knowledge of *that* order. It sustained the conviction, as we showed in our analysis of the Court's opinion at pages 5-11, *supra*, because it believed that an oral order for petitioner's appearance on July 2, 1951 had been made by Judge RYAN on June 29, 1951 and had been communicated to him by Mr. Sacher on the same day; and that, consequently, when he absconded on June 30, 1951, he did so in disobedience "of a specific order" which had been "directly communicated to him" (R. 247). That this was the ground of the Court's decision is confirmed by Judge BIGGS who, in his dissent, said (R. 257-258):

> "It is suggested, however tacitly, in the brief of the United States and it was argued before this court, that, by reason of the colloquy during the hearing of June 29, 1951, set out in pertinent part in note 2, *supra*, and the stipulation that Mr. Sacher had told Hall to be present in court on July 2, as he should have been, the court below, prior to July 2, issued a 'command', within the purview of 18 U. S. C. Section 401(3), that Hall be in court on July 2; and, since Hall was not in court on July 2 in response to this 'command', he was properly adjudged guilty of contempt in the instant proceeding. *This view*

of the case has been adopted by the majority opinion. But this court ruled in *Berry* v. *Midtown Service Corporation,* 104 F. 2d 107, 110, Judge Clark dissenting, that it had to be shown that '* * * a party must have violated an express order before he can be punished for contempt under the final clause of Section 385 (of former Title 18)', citing *Ex parte Buskirk,* 4 Cir., 72 F. 14, *Dakota Corp* v. *Slope County,* 8 Cir., 75 F. 2d 584, and *Morgan* v. *United States,* 8 Cir., 95 F. 2d 830.

"Hall was held to answer in the contempt proceeding for violation of the express order of July 2, 1951 entered by Judge Ryan on that day and insofar as the record before us shows, no other 'command' was given by the court. This was the consistent attitude of Judge Ryan and of the parties to the contempt proceeding and, veritably, the theory on which the case was tried. See, for example, Judge Ryan's statements at page 29 of the transcript of the contempt hearings and his opinion. It follows that my difficulty in holding Hall guilty of contempt is not one merely of pleading. The reason that I cannot agree with the majority on this phase of the case lies in the fact that the colloquy quoted in note 2, *supra,* and the stipulated fact that Hall's counsel had directed him to be in court on July 2, could not support an adjudication of guilt for criminal contempt against Hall even had the case been tried (as it was not) on the theory that Hall was guilty of contempt of a 'command' by the court, issued prior to the express order of July 2.

"I would reverse Hall's conviction and direct his acquittal of the charge of contempt based on Judge Ryan's order of July 2." (Italics supplied.)

IV

Petitioner was denied due process when the Court of Appeals sustained his conviction on the ground of his disobedience of an order of which he had not been accused, tried or convicted in the District Court, and the record conclusively shows that no such order was in fact made.

"Conviction on a charge not made would be sheer denial of due process", this Court said in *De Jonge* v. *Oregon*, 299 U. S. 353, 362. Such a conviction, we submit, is constitutionally objectionable whether made by a trial court or by an appellate court. The only charge made against petitioner, other than his alleged disobedience of Judge BONDY's order, was his disobedience of the "Order of Honorable Sylvester J. Ryan, United States District Judge, dated July 2, 1951" (R. 7). Prior to the trial, the Government served specifications of the contempt charged against petitioner. These specifications, so far as pertinent, read as follows (R. 7):

> "The United States of America, for its specifications of criminal contempt, alleges that the contemnor, Gus Hall, has committed criminal contempt in this Court by wilfully and knowingly disobeying and resisting the following orders, decrees and commands of this Court:
>
> 1. Order of Honorable William Bondy, United States District Judge, dated November 10, 1949;
>
> 2. Order of Honorable Sylvester J. Ryan, United States District Judge, dated April 2, 1951;*

* The specification based on Judge RYAN's order of April 2, 1951 was withdrawn by the United States Attorney at the opening of the trial (R. 11-12), after counsel for petitioner had moved to dismiss same on the ground that petitioner had not been given prior notice thereof in accordance with Rule 42(b) of the Federal Rules of Criminal Procedure (R. 10-11).

3. Order of Honorable Sylvester J. Ryan, United States District Judge, dated July 2, 1951."

Rule 42(b) of the Federal Rules of Criminal Procedure provides, so far as pertinent:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest."

The Court of Appeals has convicted petitioner of a charge of which he received no notice at all. It has convicted him of a charge on which he was never tried. Indeed, it has convicted him of a charge which, the record shows conclusively, had no basis in fact. In these circumstances, the decision of the Court of Appeals cannot be sustained on any theory that it committed harmless error within the meaning of Rule 52(d) of the Federal Rules of Criminal Procedure. The variance between the charge made against petitioner in the District Court and that of which he was convicted by the Court of Appeals has affected his substantial rights and is, therefore, fatal. He was never given the opportunity to raise substantial questions which he might have raised had he known that he would be held to account for an alleged violation of an oral order supposed to have been made and communicated to him on June 29, 1951. He would have had the right to raise, in the first instance, the objection that he had not been given notice of said charge in accordance with Rule

42(b). He would have had the right to litigate the following questions: (a) Whether Judge RYAN made any direction or issued any command or order of any kind on June 29, 1951 for petitioner's appearance on July 2, 1951; and (b) whether Mr. Sacher had communicated the making of such order, direction or command to him. Of these rights petitioner did not, as indeed he could not, avail himself, because, as Judge BIGGS so justly observes, the case was not tried "on the theory that Hall was guilty of contempt of a 'command' by the court, issued prior to the express order of July 2" (R. 258).

Moreover, the variance is such as to deprive petitioner of his right to be protected against another prosecution for the alleged disobedience of the alleged oral order of June 29, 1951, because the moving papers and specifications made no reference to same. On this score, too, must the variance be held fatal (*Berger* v. *United States*, 295 U. S. 78, 82-83).

Finally, the decision of the Court of Appeals appears to have no foundation in fact. For, as we showed at pages 8-9, *supra,* Judge RYAN himself denied at the trial of this proceeding that he had made any order or issued any command or direction on June 29, 1951 for petitioner's appearance on July 2, 1951 because, as he said, "since the mandate (of the Supreme Court) had not been received and filed in this (District) court, I felt I was without jurisdiction to make such an order" (R. 27).

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

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